Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

GEORGE M. MILLER, JR., M.D.,
GEORGE M. MILLER, JR., M.D., P.C.,
f/k/a BARIATRIC SURGERY CLINIC, P.C.,
Petitioners,

v.

STEVEN SCOTT, SURVIVING HUSBAND OF
ELIZABETH SUZANNE SCOTT, DECEASED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 18, 2007

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QUESTION PRESENTED

Should a district court's determination upon summary judgment that the proffered testimony of a medical expert witness did not meet the requirements of a Tennessee statute be reviewed under a *de novo* standard or an abuse of discretion standard?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff - Sixth Circuit Appellant - Respondent: Steven Scott.

Defendants - Sixth Circuit Appellees - Petitioners: George M. Miller, Jr., M.D. and George M. Miller, Jr., M.D., P.C.

RULE 29.6 STATEMENT

Petitioner George M. Miller, Jr., M.D., P.C. has no parent corporation, and no publicly held corporation owns ten percent 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Factual Background 5

Lower Court Proceedings 6

REASONS FOR GRANTING THIS PETITION . . . 10

I. A Split Among Circuits Exists as to Whether Determinations Regarding the Admissibility of Expert Testimony Pursuant to State Substantive Law Should

Be Reviewed Under an Abuse of Discretion or *De Novo* Standard of Review. 10

II. This Court Has Not Established the Standard of Review Applicable to Expert Testimony Determinations Pursuant to State Law. 14

III. The Sixth Circuit's Analysis of the Proffered Expert's Testimony Has So Far Departed from the Accepted and Usual Course of Proceedings as to Call for an Exercise of This Court's Supervisory Power. 16

IV. Applying an Abuse of Discretion Standard of Review Conflicts with Tennessee State Law and Will Encourage Forum Shopping and Will Result in Inequitable Administration of the Laws. 19

CONCLUSION 21

APPENDIX

Appendix A: Order of the United States Court of Appeals for the Sixth Circuit (filed Apr. 19, 2007) 1a

Appendix B: Decision of the United States Court of Appeals for the Sixth Circuit (filed Nov. 20, 2006) 6a

Appendix C: Order of the United States District Court for the Middle District of Tennessee, Nashville Division (filed Oct. 18, 2005) 24a

Appendix D: Tenn. Code Ann. § 29-26-115 (a), (b) (2007) 33a

TABLE OF AUTHORITIES

Cases **Page(s)**

Bravo v. Sumner Regional Health Systems, Inc.,
148 S.W.2d 357 (Tenn. Ct. App. 2003) 20

Brown v. Brown,
48 F.3d 1215, 1995 WL 105279 (4th Cir. Mar. 14, 1995) 11

Cortes-Irizarry v. Corporacion Insular de Seguros,
111 F.3d 184 (1st Cir. 1997) 11

Cronkrite v. Fahrbach,
853 F. Supp. 257 (W.D. Mich. 1994) 12

Crumley v. Memorial Hosp., Inc.,
509 F. Supp. 531 (E.D. Tenn. 1978) 13

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) . . . 3, 5, 8, 10, 12, 13, 14, 15

Denton v. United States,
731 F. Supp. 1034 (D. Kan. 1990) 13

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 15, 19

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 19

General. Elec. Co. v. Joiner,
522 U.S. 136 (1997) 3, 8, 14

Higgenbottom v. Noreen,
586 F.2d 719 (9th Cir. 1978) 12

In re Paoli Railroad Yard PCB Litigation,
35 F.3d 717 (3d Cir. 1994) 12

Jeffress v. Reddy,
77 F. App'x 627, 2003 WL 22293579, 62 Fed. R. Evid. Serv. 1372 (4th Cir. Oct. 7, 2003) 11

Kenyon v. Handal,
122 S.W.3d 743 (Tenn. Ct. App. 2003) 20

Kourkounakis v. Russo,
167 F. App'x 255, 2006 WL 354642 (2d Cir. Feb. 14, 2006) 11

Kuhmo Tire Co. v. Carmichael,
526 U.S. 137 (1999) 3, 9, 14, 15

Legg v. Chopra,
286 F.3d 286 (6th Cir. 2002) 12

Mabon v. Jackson-Madison County General Hosp.,
968 S.W.2d 826 (Tenn. Ct. App. 1997) 20

McDowell v. Brown,
392 F.3d 1283 (11th Cir. 2004) 12

Myers v. Medical Center of Delaware, Inc.,
105 F. App'x 403, 2004 WL 1690150 (3d Cir. July 29, 2004) 12

Peck v. Tegtmeyer,
834 F. Supp 903 (W.D. Va. 1992) 13

Ralph v. Nagy,
749 F. Supp. 169 (M.D. Tenn. 1990) 12

Roberts v. Bicknell,
73 S.W.3d 106 (Tenn. Ct. App. 2001) 20

Russell v. Wendt,
929 F2d 703, 1991 WL 46395 (7th Cir. Apr. 4, 1991) 12

Slifcak v. Northern Mich. Hosps., Inc., No. 90-CV-565, 1991 WL 626469 (W.D. Mich. Aug. 19, 1991) 12

Sullivan v. U.S. Dept. of Navy,
365 F.3d 827 (9th Cir. 2004) 12

Tucker v. American Tel. & Tel. Corp.,
794 F. Supp. 240 (W.D. Tenn. 1992) 12

Tusshani v. U.S.,
6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001) 12

Wilson v. Patterson,
73 S.W.3d 95 (Tenn. Ct. App. 2002) 20

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 6

40 Pa. Cons. Stat. § 1303.512 4

730 Ill. Comp. Stat. 5/5-2-5 4

735 Ill. Comp. Stat. 5/2-622 4

735 Ill. Comp. Stat. 5/8-2501 4

Ala. Code § 6-5-548 3

Alaska Stat. § 09.20.185 3

Ariz. Rev. Stat. § 12-2604 3

Ark. Code Ann. § 16-114-207 3

Colo. Rev. Stat. § 13-64-401 3

Conn. Gen. Stat. § 52-184c 4

Del. Code Ann. tit. 18, § 6853-54 4

Fla. Stat. § 766.102 4

Fla. Stat. § 90.702 4

Ga. Code Ann. § 24-9-67.1 4

Idaho Code § 6-1012-13 4

Iowa Code § 147.139 4

Iowa Code § 232B.10 4

Kan. Stat. Ann. § 60-3412 4

La. Rev. Stat. Ann. § 9:2794 4

Md. Cts. & Jud. Proc. Code Ann. § 3-2A-02 4

Mich. Comp. Laws § 600.2169 4

Miss. Code Ann. § 11-1-61 4

Miss. Code Ann. § 13-1-409 4

Mo. Rev. Stat. § 490.065 4

Mont. Code Ann. § 26-2-601 4

Mont. Code Ann. § 41-3-102 4

Mont. Code Ann. § 72-12-402 4

N.C. Gen. Stat. § 8C-1, Rule 702 4

N.J. Rev. Stat. § 2A:53A-41 4

N.M. Stat. Ann. § 41-5-23 4

Ohio Rev. Code Ann. § 2743.43 4

Okla. Stat. tit. 63, § 1-1708.1I 4

R.I. Gen. Laws § 9-19-41 4

S.C. Code Ann. § 15-36-100 4

Tenn. Code Ann. § 29-26-115 4

Tenn. Code Ann. § 29-26-115(a) & (b) 1

Tenn. Code Ann. § 29-26-115(a)(1) 7, 9, 10

Tex. Civ. Prac. & Rem. Code Ann. § 74.401-03 . . 4

Va. Code Ann. § 8.01-581.20 4

W. Va. Code § 30-16-18 4

W. Va. Code § 55-7B-7 4

Rules

Fed. R. Evid. 104(a) 13

Fed. R. Evid. 601 . . . . . 12, 13

Fed. R. Evid. 702 . . . . . 9, 10, 12, 13

Other Authorities

27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6003 (1990) 13

James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case, as to Standard of Care Required of Defendant Practicing in Another Locality*, 37 A.L.R.3d 420 (1971) 4, 14

John M. Conley, Scott W. Gaylord, *Scientific Evidence in the State Courts, Daubert and the Problem of Outcomes*, 44 NO. 4 Judges' J. 6 (2005) 13

Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 Denv. U. L. Rev. 69 (1999) 3, 13, 14

PETITION FOR WRIT OF CERTIORARI

Petitioners George M. Miller, M.D. and George M. Miller, M.D. P.C. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Amended Opinion of the Sixth Circuit Court of Appeals upon Petition for ReHearing and En Banc Hearing is found in Appendix A.

The original Opinion of the Sixth Circuit Court of Appeals is found in Appendix B.

The Opinion of the District Court is found in Appendix C.

JURISDICTION

The Amended Opinion of the Sixth Circuit Court of Appeals upon Petition for ReHearing and En Banc Hearing was entered on April 19, 2007.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Tennessee Code Annotated §§ 29-26-115(a) & (b) are attached as Appendix D and state:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by

subsection (b): (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred; (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals reviewed under a *de novo* standard the District Court's determination that the Plaintiff's medical expert was not qualified to offer testimony

pursuant to Tennessee's medical malpractice statute. Under this standard, the Sixth Circuit substituted it's own judgment for the judgment of the District Court rather than defer to the District Court's decision. Because a State statute rather than Federal Procedural law established the standards for admissibility of expert testimony, the Sixth Circuit avoided the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997), and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), which hold that decisions regarding the admissibility of expert testimony must be reviewed under an abuse of discretion standard.

Although this Court has addressed the application of the abuse of discretion standard of review for the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, this Court has not addressed the whether an abuse of discretion standard of review should be applied to a district court's determination of the admissibility of expert testimony pursuant to a State statute. The circuit courts are divided on this issue. The Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have elected to review such determinations under an abuse of discretion standard. The First, Fourth, and Sixth Circuits, however, have analyzed these determinations under a *de novo* standard of review.

Most States have laws establishing standards for admissibility of expert testimony offered by experts in medical malpractice cases.[1] *See* Robin Kundis Craig, *When*

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[1] The following State statutes address medical expert testimony: Alabama, Ala. Code § 6-5-548; Alaska, Alaska Stat. § 09.20.185; Arizona, Ariz. Rev. Stat. § 12-2604; Arkansas, Ark. Code Ann. § 16-114-207; Colorado, Colo. Rev. Stat. § 13-64-401; Connecticut,

Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court, 77 Denv. U. L. Rev. 69, 72, n.15 (1999); James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case, as to Standard of Care Required of Defendant Practicing in Another Locality*, 37 A.L.R.3d 420 (1971). Federal district courts sitting in diversity are frequently called upon to apply such State laws when determining whether an expert is qualified to offer opinions and whether the expert opinions are themselves admissible. Widely varying approaches to these questions have evolved in the circuit and district courts. As a result, different standards of review are being applied to the same substantive determinations of admissibility of expert testimony.

Conn. Gen. Stat. § 52-184c; Delaware, Del. Code Ann. tit. 18, § 6853-54; Florida, Fla. Stat. §§ 90.702, 766.102; Georgia, Ga. Code Ann. § 24-9-67.1; Idaho, Idaho Code § 6-1012-13; Illinois, 730 Ill. Comp. Stat. 5/5-2-5, 735 Ill. Comp. Stat. 5/8-2501, 5/2-622; Iowa, Iowa Code §§ 147.139, 232B.10; Kansas, Kan. Stat. Ann. § 60-3412; Louisiana, La. Rev. Stat. Ann. § 9:2794; Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-2A-02; Michigan, Mich. Comp. Laws § 600.2169; Mississippi, Miss. Code Ann. §§ 11-1-61, 13-1-409; Missouri, Mo. Rev. Stat. § 490.065; Montana, Mont. Code Ann. §§ 26-2-601, 41-3-102, 72-12-402; New Jersey, N.J. Rev. Stat. § 2A:53A-41; New Mexico, N.M. Stat. Ann. § 41-5-23; North Carolina, N.C. Gen. Stat. § 8C-1, Rule 702; Ohio, Ohio Rev. Code Ann. § 2743.43; Oklahoma, Okla. Stat. tit. 63, § 1-1708.1I; Pennsylvania, 40 Pa. Cons. Stat. § 1303.512; Rhode Island, R.I. Gen. Laws § 9-19-41; South Carolina, S.C. Code Ann. § 15-36-100; Tennessee, Tenn. Code Ann. § 29-26-115; Texas, Tex. Civ. Prac. & Rem. Code Ann. § 74.401-03; Virginia, Va. Code Ann. § 8.01-581.20; West Virginia, W. Va. Code §§ 30-16-18, 55-7B-7.

District court determinations regarding the admissibility of expert testimony upon a motion for summary judgment should be uniformly reviewed under an abuse of discretion standard regardless of whether Federal procedural law or State substantive law governs. *Daubert* and its progeny squarely established that when Federal procedural law establishes the requirements for the admissibility for expert testimony such determinations of admissibility are to be reviewed under an abuse of discretion standard. The standard of review should not differ when State law rather than Federal procedural law governs the admissibility of expert testimony. The Petitioners respectfully request that this Court unify the standard of review for all determinations regarding the admissibility of expert testimony upon summary judgment.

Factual Background

Plaintiff's spouse, a Georgia resident, was morbidly obese and sought surgical treatment for her obesity from Defendant George M. Miller, Jr., M.D., who practiced in Nashville, Tennessee. On October 17, 2001, Mrs. Scott saw Dr. Miller for evaluation for laparoscopic Roux-en-Y gastric bypass weight loss surgery to her. On November 15, 2001, Dr. Miller performed the surgery at Centennial Medical Center in Nashville, Tennessee. On November 18, 2001, Mrs. Scott was discharged from Centennial Medical Center and returned to her home in Georgia. On November 19, 2001, Mrs. Scott's family contacted Dr. Miller by telephone several times during the day to report various complaints. Dr. Miller recommended that she be taken to the nearest hospital emergency room that evening. Mrs. Scott was taken to a local hospital where she underwent surgery. A leak was discovered in an anastomosis created during the gastric bypass surgery. The Georgia surgeon elected to reverse the gastric bypass Dr. Miller had created. Mrs. Scott suffered

complications and expired on November 28, 2001 when she was removed from life support.

Lower Court Proceedings

The Plaintiff originally commenced this medical malpractice action in the Circuit Court for Davidson County, Tennessee on November 13, 2002. Discovery was conducted. However, the Plaintiff voluntarily dismissed his action on the eve of the disclosure date for expert witnesses supporting his claims. The Plaintiff then commenced this action in Federal court on November 5, 2004 making the same allegations as in the State court action. Jurisdiction existed in the District Court on the basis of diversity jurisdiction, 28 U.S.C. § 1332.

On March 3, 2005, Dr. Miller and his professional corporation filed a properly supported Motion for Summary Judgment. The Plaintiff filed a response in opposition supported by the affidavit of Jeffrey W. Allen, M.D. Recognizing Dr. Allen's lack of qualifications to offer expert testimony and the lack of facts and data supporting his opinions, the Defendants sought permission to file a reply brief pursuant to the District Court's local rules. The Plaintiff then filed a second affidavit from its proffered expert, Dr. Allen. Thereafter, the Defendants filed a reply memorandum challenging the qualifications of the Plaintiff's proffered expert.

On October 18, 2005, the District Court entered an Order and memorandum granting the Defendants' Motion for Summary Judgment. The District Court determined that the Plaintiff's expert was not qualified under Tennessee law to offer opinion testimony and that he failed to demonstrate that he had sufficient knowledge of the standard of care applicable to Dr. Miller in Nashville, Tennessee:

Dr. Allen's affidavit lacks a sufficient factual showing of his knowledge of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allen's affidavit is also too conclusory to establish his familiarity with this particular specialty. Dr. Allen makes the conclusory assertion that "doctors in both communities have equal access to...state of the art equipment, consulting and proctoring physicians for advice and training, and medical information in general." Dr. Allen, however, does not provide any knowledge of "state of the art equipment" for this practice in Nashville. Dr. Allen does not state that he has performed surgeries or supervised surgeries in Nashville. Nor does Dr. Allen identify these "similar communities" where he has proctored surgeries."

To comply with Tennessee law, Plaintiff's expert must offer more specific facts of his knowledge the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. Without such facts or data, the Court cannot conclude whether there is a sufficient predicate to establish the relevant community standard under Tennessee law. Dr. Allen's affidavit describes a regional or national or international standard of care and such a standard does not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1).

For these reasons, the Court concludes that Dr. Allen is not a qualified expert under Tennessee law and without a qualified expert, the Plaintiff's proof fails to support a judgment on his claims. Thus, the

> Defendants' motion for summary judgment should be granted. (App. C).

On October 25, 2005, the Plaintiff filed a Notice of Appeal challenging the Order granting the Defendants' motion for summary judgment.

On November 20, 2006, the Sixth Circuit issued an opinion reversing the District Court. In rejecting the abuse of discretion standard of review, the Sixth Circuit applied a *de novo* standard of review because the issue regarding Dr. Allen's proffered expert testimony "was resolved in the context of summary judgment." The Sixth Circuit's opinion stated:

> The district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, *i.e.* there was no genuine issue as to a material fact regarding whether Dr. Allen satisfied the requirements of Tennessee law. Although the issue has evidentiary overtones, the appropriate standard of review of the district court's decision is *de novo* because the issue was resolved in the context of summary judgment.

Notably, one justice wrote an opinion concurring in the result but disagreeing with the majority's opinion that Dr. Allen's affidavit satisfied Tennessee's statute governing medical malpractice experts.

The Defendants filed a Petition to Rehear and for En Banc Hearing challenging the Court's use of the *de novo* standard of review. The Defendants relied upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General.*

Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

In response, the Sixth Circuit issued a new opinion on April 19, 2007 substituting a new paragraph in its opinion to explain its application of the *de novo* standard of review. The Sixth Circuit explained that the District Court's finding that "Dr. Allen [was] not a qualified expert under Tennessee law" was not an evidentiary ruling. Instead, the Sixth Circuit characterized the District Court ruling as a determination of whether the standard of care actually described by the proffered expert was sufficient to create a genuine issue of material fact:

> [T]he district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, a conclusion which we would review for an abuse of discretion. Instead, the district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, i.e., that there was no genuine issue as to a material fact regarding whether the evidence of the applicable standard of care set forth in Dr. Allen's affidavit satisfied the requirements of Tennessee law.

The Sixth Circuit further explained in a footnote:

> Admittedly, the district court's opinion is not entirely clear. At one point, the district court states that "Dr. Allen is not a qualified expert under Tennessee Law," Dist. Ct. Op'n at 6, although one line earlier, the district court states that the evidence of the standard of care set forth in Dr. Allen's affidavit "does not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1). Reviewing the district

> court's analysis in its entirety, we believe that the district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, but instead the district concluded that the evidence of the applicable standard of care set forth in Dr. Allen's affidavit did not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1). (App. A).

Contrary to the Sixth Circuit's characterization, an analysis of the District Court's entire memorandum opinion reveals that District Court was concerned about the reliability of the proffered expert's opinion because it was "too conclusory" and not supported by facts and data. These are the same determinations made by the trial courts in *Daubert* and its progeny. *Daubert* and its progeny establish an abuse of discretion standard of review. Yet, the Sixth Circuit applied a *de novo* standard of review and substituted its own determination regarding the admissibility of the proffered expert's testimony.

REASONS FOR GRANTING THIS PETITION

I. A Split Among Circuits Exists as to Whether Determinations Regarding the Admissibility of Expert Testimony Pursuant to State Substantive Law Should Be Reviewed Under an Abuse of Discretion or *De Novo* Standard of Review.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, this Court addressed the admissibility of expert testimony under Federal procedural law and held that an abuse of discretion standard was the correct standard for review of determinations of admissibility. However, *Daubert* and its progeny did not address determinations of admissibility of expert testimony made

pursuant to State law by a district court sitting in diversity. In the absence of guidance from this Court, several circuit courts have applied conflicting standards of review in such cases.

Like the Sixth Circuit in this case, the First and Fourth Circuits have applied a *de novo* standard of review to district court decisions regarding an expert's testimony pursuant to State law in the course of summary judgment proceedings. *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184 (1st Cir. 1997) (applying Puerto Rico law); *Jeffress v. Reddy*, 77 F. App'x 627, 2003 WL 22293579, 62 Fed. R. Evid. Serv. 1372 (4th Cir. Oct. 7, 2003) (applying North Carolina law).[2]

In conflict with the First, Fourth, and Sixth Circuits are the Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits which have applied an abuse of discretion standard when reviewing district court decisions regarding an expert's testimony pursuant to State law in the course of summary judgment proceedings. *Kourkounakis v. Russo*, 167 F. App'x 255, 2006 WL 354642 (2d Cir. Feb. 14, 2006) (applying

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[2] In *Jeffress*, the court employed an analysis similar to the analysis used by the Sixth Circuit in this case. The *Jeffress* court characterized the issue before it as whether the evidence of causation from the proffered experts satisfied the requirements of State law. Yet, the court actually examined and analyzed whether the proffered expert's opinions were supported by sufficient knowledge of facts of the patient's condition and medical history. This decision was reviewed under a *de novo* standard. *Id.* at *632, **5. *But see Brown v. Brown*, 48 F.3d 1215, 1995 WL 105279 (4th Cir. Mar. 14. 1995) (applying Virginia law and an abuse of discretion standard when reviewing the district court's determination that that the proffered expert was "unqualified" to offer expert testimony under the State law requirements).

New York Law); *Myers v. Medical Center of Delaware, Inc.*, 105 F. App'x 403, 2004 WL 1690150 (3d Cir. July 29, 2004) (applying Delaware law); *Russell v. Wendt*, 929 F2d 703, 1991 WL 46395 (7th Cir. Apr. 4, 1991); *Sullivan v. U.S. Dept. of Navy*, 365 F.3d 827 (9th Cir. 2004) (applying California law); *Tusshani v. U.S.*, 6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001); *McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004) (applying Georgia law).

The divergence in the Circuit Courts is not surprising given the varying approaches taken by district courts when analyzing the admissibility of expert testimony pursuant to State statutes. The Third, Sixth, Ninth, Tenth, and Eleventh Circuits have determined that both *Daubert* and State law may govern the admissibility of expert testimony. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 750 (3d Cir. 1994); *Sullivan v. U.S. Dept. of Navy*, 365 F.3d 827 (9th Cir. 2004); *Tusshani v. U.S.*, 6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001); *McDowell v. Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004).

The Sixth, Ninth, and Eleventh circuits have created a framework of analyzing an expert's competency pursuant to State Statute under Federal Rule of Evidence 601 and an expert's qualifications and actual testimony under Federal Rule of Evidence 702. *Legg v. Chopra*, 286 F.3d 286, 289-92 (6th Cir. 2002); *Higgenbottom v. Noreen*, 586 F.2d 719, 722 (9th Cir. 1978); *McDowell v. Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004).[3] These decisions conflict with this

[3] A number of district courts have followed this analysis: *See Cronkrite v. Fahrbach*, 853 F. Supp. 257, 259 (W.D. Mich. 1994); *Tucker v. American Tel. & Tel. Corp.*, 794 F. Supp. 240, 245 (W.D. Tenn. 1992); *Slifcak v. Northern Mich. Hosps., Inc.*, No. 90-CV-565, 1991 WL 626469, at *2 (W.D. Mich. Aug. 19, 1991); *Ralph v. Nagy*, 749 F. Supp. 169, 172-73 (M.D. Tenn. 1990);

Court's suggestion, in the absence of a substantive State law regarding expert testimony, that a trial judge must assess the qualifications of any expert pursuant to Federal Rule of Evidence 104(a). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, n. 10 (1993).

Contrary to these circuits, learned legal writers have firmly asserted that Rule 601 "has nothing to do with other questions of legal status that have also been called questions of competence. Thus, Rule 601 does not deal with...the admissibility of expert opinion testimony, often referred to as involving the competency to testify as an expert." 27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6003 (1990). The authors further comment, "It should be clear that Rule 601 does not pertain to the so-called competency of expert witnesses to testify in the form of an opinion. Testimony by experts is governed by Rule 702, which specifies that a witness may be qualified as an expert by virtue of knowledge, skill, experience, training or education." *Id.* Other writers have advocated different approaches for reconciling *Daubert* and State statutes governing the admissibility of expert testimony. *See* Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court,* 77 Denv. U. L. Rev. 69 (1999); John M. Conley, Scott W. Gaylord, *Scientific Evidence in the State Courts, Daubert and the Problem of Outcomes*, 44 NO. 4 Judges' J. 6 (2005).

Denton v. United States, 731 F. Supp. 1034, 1036 (D. Kan. 1990); *Crumley v. Memorial Hosp., Inc.*, 509 F. Supp. 531, 532 n.2 (E.D. Tenn. 1978). *But see Peck v. Tegtmeyer*, 834 F. Supp 903, 910 (W.D. Va. 1992) (holding that Rule 702 governs the admissibility of medical experts even if the question can be viewed as one of competency).

All determinations of the admissibility of expert testimony involve analyses of whether the expert is qualified and whether the expert's opinions are supported by sufficient facts or data to make them reliable. These analyses are not significantly changed when State law rather than Federal procedural law provides the criteria against which the expert's testimony must be measured. District Courts should have the same wide discretion to make determinations of the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law applies.

II. This Court Has Not Established the Standard of Review Applicable to Expert Testimony Determinations Pursuant to State Law.

This case presents an important question. This Court has confirmed in three separate opinions the application of the abuse of discretion standard of review for the admissibility of expert testimony under Federal procedural law in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997); and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). However, this Court has not addressed the standard of review to be applied to a district court's expert testimony determination when a State statute rather than Federal procedural law provides the criteria for admissibility.

Most States prescribe unique burdens of proof and requirements for the admissibility of expert testimony in medical malpractice cases. *See supra* note 1; Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 Den. U.L. Rev. 69, 72, n.15 (1999); James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case,*

as to Standard of Care Required of Defendant Practicing in Another Locality, 37 A.L.R.3d 420 (1971). Federal courts sitting in diversity are required to apply these State statutes. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

When expert testimony is measured against Federal procedural law, "a court of appeals is to apply an abuse-of-discretion standard when it 'review[s] a trial court's decision to admit or exclude expert testimony." *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Furthermore, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable...The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id.*

In spite of these clear statements of law in *Kuhmo*, the circuit courts have already begun to diverge on the correct application of the Federal Rules of Evidence to analyze the admissibility of expert testimony under State statutes and the correct standard for reviewing such decisions. This Court's review is necessary to complete the course begun by *Daubert* and its progeny and establish a uniform standard of review for determinations of the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law governs admissibility.

III. The Sixth Circuit's Analysis of the Proffered Expert's Testimony Has So Far Departed from the Accepted and Usual Course of Proceedings as to Call for an Exercise of This Court's Supervisory Power.

The Sixth Circuit's characterization of the District Court's decision is severely flawed in spite of its attempt to correct its opinion. The Sixth Circuit's characterization lacks logic and is not supported by the record. Exercise of this Court's supervisory power is necessary to correct this error, which the Sixth Circuit is determined to perpetuate.

The Sixth Circuit framed the issue regarding the admissibility of the proffered expert's testimony as a question of law subject to *de novo* review rather than a question of admissibility subject to abuse of discretion review. The Sixth Circuit characterized the District Court's determination not as whether the plaintiff's proffered expert was qualified or whether his testimony was admissible. Instead, the Sixth Circuit characterized the District Court's determination as whether the evidence of the standard of care described by the proffered expert was sufficient to create a genuine issue of material fact as to the standard of care applicable to the Defendant physician. This distinction is not supported by the record.

If the Sixth Circuit's characterization were accurate, then an issue would exist as to the proffered expert's description of what actions the standard of care required the defendant physician to take or not take in his care and treatment of the patient. For example, the issue might be the sufficiency of the proffered expert's description of how a surgical technique should or should not be performed or the expert's description

of the circumstances under which a test should be performed or not performed.

However, the Sixth Circuit's characterization was not the issue decided by the District Court. Indeed, the proffered expert's affidavit offered very concrete opinions as to what he believed the standard of care required the Defendant physician to do or not do in this case. Thus, if the Plaintiff's proffered expert were qualified and his opinions admissible, then certainly a genuine issue of material fact would exist between the Defendant physician's description of the actions the standard of care required him to take and the proffered expert's description of the actions the standard of care required the Defendant to take. However, the District Court focused upon the bases for and the reliability of the proffered expert's opinions rather than on the expert's opinion of the actions he believed the standard of care required the Defendant to take.

Contrary to the Sixth Circuit's characterization, the District Court did not find fault in the proffered expert's opinion of the actions the defendant physician should or should not have taken. This aspect of the proffered expert's opinion was not discussed. Instead, the District Court analyzed whether the bases for the proffered expert's opinion were reliable and supported by facts and data.

The District Court analyzed whether the opinions of the proffered expert were reliable and admissible under Tennessee law. Indeed, all of the District Court's comments about the Plaintiff's proffered expert were directed to the reliability of the facts and data supporting the expert's opinion. The District Court wrote in its memorandum opinion:

> Dr. Allen's affidavit lacks a sufficient factual **showing of his knowledge** of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allen's affidavit **is also too conclusory** to establish his familiarity with this particular specialty...Dr. Allen, however, **does not provide any knowledge** of "state of the art equipment" for this practice in Nashville. Dr. Allen **does not state that he has performed surgeries or supervised surgeries in Nashville**. Nor does Dr. Allen **identify these "similar communities"** where he has proctored surgeries."
>
> To comply with Tennessee law, Plaintiff's expert **must offer more specific facts of his knowledge** the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. **Without such facts or data, the Court cannot conclude whether there is a sufficient predicate** to establish the relevant community standard under Tennessee law. (App. C) (emphasis added).

The District Court's memorandum focuses upon the lack of support for the proffered expert's opinions and the lack of reliability of the testimony. The memorandum does not focus on the proffered expert's description of the actual standard of care. Because the District Court's focus was upon the lack of factual support and lack of reliability, the District Court was analyzing the admissibility of the proffered expert testimony. The Sixth Circuit should have given the District Court wide discretion to determine the admissibility of the proffered expert's testimony.

The Sixth Circuit's characterization of the District Court's ruling is not supported by the record. The District Court's determination focused upon the reliability and facts and data supporting the proffered expert's testimony. Such determinations address the admissibility of the expert's testimony, and should be uniformly subject to an abuse of discretion standard of review regardless of whether the criteria for admissibility are established by State statute or Federal procedural law.

IV. Applying an Abuse of Discretion Standard of Review Conflicts with Tennessee State Law and Will Encourage Forum Shopping and Will Result in Inequitable Administration of the Laws.

The District Court's jurisdiction was based upon diversity. "Absent a federal question, 'the law to be applied in any case is the law of the state." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (citations omitted).

The outcome of this case should not turn on whether it is pending in State or Federal Court. Yet, the Sixth Circuit's application of a *de novo* standard of review did indeed alter the outcome. If summary judgment had been granted by a Tennessee trial court, the Tennessee Court of Appeals would have reviewed the decision under an abuse of discretion standard and affirmed the trial court's rejection of the Plaintiff's expert testimony. By dismissing this case in State court and re-filing the case in Federal court, the Plaintiff was

able to obtain a more favorable standard of review and diminish the trial court's discretion regarding expert testimony. As a result, forum shopping is encouraged because diversity litigants wishing for a more favorable standard of review will choose to file in Federal district courts rather than Tennessee State courts.

Tennessee Courts have uniformly applied an abuse of discretion standard when reviewing trial court determinations regarding challenges to expert testimony upon motions for summary judgment. In the following Tennessee appellate court opinions an abuse of discretion standard of review was applied to trial courts' determinations materially indistinguishable to the determinations of the District Court in this case: *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997); *Roberts v. Bicknell*, 73 S.W.3d 106, 113-114 (Tenn. Ct. App. 2001); *Wilson v. Patterson*, 73 S.W.3d 95 (Tenn. Ct. App. 2002); *Bravo v. Sumner Regional Health Systems, Inc.*, 148 S.W.2d 357, 363-64 (Tenn. Ct. App. 2003); and *Kenyon v. Handal*, 122 S.W.3d 743, 758-59 (Tenn. Ct. App. 2003).

The outcome of this State law case should not have been altered because it happened to be pending in a Federal Court a few blocks away from a Tennessee State trial court. The Sixth Circuit's ruling creates a divergence from State law. Under the Sixth Circuit's present ruling, Tennessee district court decisions excluding expert testimony within summary judgment proceedings will be reviewed differently from the same types of decisions in Tennessee State Courts. This Petition for Writ of Certiorari should be granted to prevent inequitable administration of Tennessee law and forum shopping.

CONCLUSION

District Courts engage in the same types of analyses when determining the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law establishes the criteria for admissibility. When such determinations are made pursuant to Federal procedural law, it is well settled that such determinations will be reviewed under an abuse of discretion standard. The standard of review should not be altered when State substantive law provides the criteria for admissibility. The Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to answer this important procedural question and resolve the divergent procedural approaches among the Circuit Courts.

Respectfully submitted,

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